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JUDICIAL POLICY-MAKING AND THE PECULIAR FUNCTION OF LAW

RICHARD S KAY*

While the nature of legal systems is a perpetually contested question, it is fairly uncontroversial that each must contain certain essential characteristics. First, each must suppose some picture of the appropriate way for human beings subject to it to live together in society. Second, to secure that proper arrangement, each must employ, to a greater or lesser degree, the device of general rules of conduct. Finally, in all but the simplest systems, the effectiveness of those rules must be guaranteed by some process of adjudication. The relationships among these three factors – social values, legal rules and judging – comprise much of our study of jurisprudence. In this essay, I want to reprise that theme, paying particular attention to the mutual tensions these elements create in the practical operation of a legal system. I want, that is, to review the difficulties inherent in the use of abstract rules to vindicate social policies in concrete cases.¹

I POLICY AND LAW

All law is policy. Every application of law is an implementation of policy. By policy, I mean a contingent judgment about the shape and functioning of collective arrangements for human affairs. Rules of law arise, either directly or indirectly, from policy choices made by some person or persons recognized as having authority to make them.

To speak of the role of policy in public law adjudication seems, therefore, to state a tautology. The adjudication of the apocryphal kadi, perhaps, occurs without reference to purposive rules – though it is hard to imagine even the most arbitrary of kadis who does not refer to some minimally consistent standards of good social order.² But *legal* adjudication always purports to be based on some articulated rule or rules and, therefore, is the effectuation of the policy embodied in those rules. This is true in every legal adjudication of whatever kind, in private law as well as public.

This conclusion is premised on the assumption that rules of law issue from deliberate human choices. There are, or at least once were, contrary schools of thought. They supposed a complete system of law that existed independent of any particular human will. The job of the legal adjudicator was to tease out the relevant rules from that abstract, we might say noumenal, system. The ancient and persistent

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¹ I concentrate, typically I suppose, on the law of the state. I expect, however, that the same issues, in modified forms, afflict any system of law and adjudication that depends on positive rules.

² The reference to the kadi in Anglo-American legal discourse as a dispenser of ad hoc adjudication (eg *Terminello v Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter J dissenting); *McPhail v Persons* (names unknown); *Bristol Corporation v Ross and Another* [1973] Ch 447, [1973] 3 All ER 393 (CA Civ) is, of course, a slander on the actual historical practice of kadis who are bound to administer the Islamic law of the Sharia. See Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)' (2004) 52 *American Journal of Comparative Law* 209.

belief in some *a priori* system of 'natural law' is an obvious case. But it is not so clear that even natural law is without 'policy' in the sense I have stipulated. There are many versions of natural law, but pretty much all of them are teleological, insofar as they involve some ideal picture of human existence. Some modern versions follow from a particular definition of human flourishing and work out their rules as instruments for facilitating it.³ More traditionally, natural law is treated as a reflection of divine law – the law that God promulgates.⁴ Natural law, in this sense, is no exception to the general assumption that law reflects some policy.⁵ Even John Austin cheerfully accorded divine law the character of real law since it consisted of commands emanating from 'a certain source'.⁶

More problematic was the historical view of the common law as an entity, the origins of which preceded the reach of human memory. It was presumed to be a system more perfect than any that could be devised by living human beings and it was assumed that the application of reason to available precedents could approximate, but never entirely capture, its sense. Joseph Story, whose opinion in the United States Supreme Court's judgment in *Swift v Tyson*⁷ is sometimes treated as the definitive American statement of this attitude, thought that the real, controlling rules of conduct were 'antecedent' to any decision of judges and that judicial decisions were valuable only for 'their supposed conformity to those rules'.⁸ The perfection of common law, however, was often attributed to its supposed derivation from natural law and, consistent with the understanding of natural law just noted, its rules were thus indirect manifestations of the will of God. On the title page of his reports, Coke quotes Cicero to the effect that law adheres to the divine purpose.⁹

Nothing could now be more thoroughly discredited than this view of common law. In the early nineteenth century, Austin ridiculed the 'childish fiction ... that judiciary or common law ... is a miraculous something made by nobody, existing, I suppose from eternity ...'.¹⁰ By the arrival of the twentieth century, the claim that all law had some particular human source was irresistible. The common law, Holmes wrote, in a now almost canonical formulation, is not some 'brooding omnipresence in the sky'. 'The fallacy and illusion ... consist in supposing that there is this outside thing to be found. Law ... does not exist without some definite authority behind it.'¹¹ It followed that law is always made for a reason. Holmes's well-known explanation of the basis for judicially created conditions in private contracts summarizes the point:

³ John Finnis, *Natural Law and Natural Rights* (1980).

⁴ See Thomas Aquinas, *Summa Theologica*, pt II-1, Q. 91.

⁵ Ibid art 4: 'But since man is ordained to an end of eternal happiness which is inproportionate to man's natural faculty, as stated above (5, 5), therefore it was necessary that, besides the natural and the human law, man should be directed to his end by a law given by God.'

⁶ John Austin, *The Province of Jurisprudence Defined* (1832) 139.

⁷ 41 US (16 Pet) 1, 18-19 (1842).

⁸ Joseph Story, 'Value and Importance of Legal Studies' in W Story (ed), *The Miscellaneous Writings of Joseph Story* (1852, revised ed 1972) 503, 508.

⁹ See Paul Raffield, 'Contract, Classicism and Common-Weal: Coke's Reports and the Foundations of the Modern English Constitution' (2005) 17 *Cardozo Studies in Law and Literature* 69, 71.

¹⁰ John Austin, *Lectures on Jurisprudence* (4th ed, 1879) 655. See also John Austin, *The Province of Jurisprudence Determined* (1832) passim 126-97, referring to the requirement that law originate from a 'determinate' sovereign.

¹¹ *Black & White Taxicab and Transfer Co v Brown and Yellow Taxicab and Transfer Co*, 276 US 518, 533 (Holmes J dissenting).

You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy or, in short, because of some attitude of yours upon a matter not capable of exact quantitative management, and therefore not capable of founding exact logical conclusions.¹²

The grounds, then, of judicial decisions, in private as well as public law, are 'legislative', even if 'inarticulate and unconscious'.¹³ In fact, the whole structure of the core common law regimes of contract, tort and property reflect a human attempt to protect certain large values – autonomy, property, equality and stability – which foster the success of the 'liberal' society.¹⁴ Public law, the law governing the forms and limits of collective action, inevitably exhibits the same character. Every instance represents some judgment as to what the institutions of the state should do and how they should do it.¹⁵

II COMMON LAW AS A SOURCE OF PUBLIC POLICY

In what way, then, can the role of policy in public law adjudication be controversial? The critical question is not whether a judicial decision embodies some policy, but the source of that policy. Put simply, the question is whether judges make their own policy or apply someone else's. The same question can be put in more traditional form: To what extent do judges make new law in the course of adjudication?

As already indicated, the demise of the 'brooding omnipresence' understanding of common law has resulted in a universal recognition that judges, at least sometimes, make law in the course of private law adjudication. Nevertheless, almost all such decisions are justified on the basis of some rule perceived as already explicit or implicit in the decided cases. In those cases, the policy applied is taken as a given. In a few cases, on the other hand, a court (explicitly or implicitly) modifies or reverses a rule inferable from prior cases. Now, it acts not as the executor of a pre-existing policy, but as the formulator of policy. Admittedly, in this context, the double role of courts and their capacity to obscure the degree to which they are extending or departing from prior law, often makes the distinction hard to recognize.¹⁶ But in private law matters, not pre-empted by statute, some legitimate, if limited, legislative role of the judge is beyond the point of controversy.

¹² Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 466. For a modern judicial re-affirmation of the inevitability of policy choice in adjudication see *Cooper v Cooper*, 102 ACWS (3d) 783, [27], n 4.

¹³ See Holmes, above n 12, 466.

¹⁴ See Maimon Schwarzschild, 'Keeping It Private' (2006) 25 *University of Queensland Law Journal* 215, 217.

¹⁵ To the extent the state is an enterprise committed to the achievement of certain collective objectives, what Michael Oakeshott called a *universitas*, this point is even more emphatic. Michael Oakeshott, *On Human Conduct* (1975) 199-215. For a modern attempt to re-construct a 'non-instrumentalist' concept of law, see Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (2006).

¹⁶ Benjamin Cardozo condemned 'the evasion, the pretense, the shallow and disingenuous distinctions too often manifest in opinions – distinctions made in the laudable endeavor to attain a just result while preserving a semblance of consistency.' Benjamin Cardozo,

At least on the surface, the position in public law adjudication is quite different. In modern legal systems, public law is almost always *enacted law*. There are exceptions, however, notably in the United Kingdom, where the legal system does not recognize a written, enacted, legally enforceable constitution that creates and defines the scope of the law-making power. Even public law, therefore, may sometimes derive from common law sources. In fact, however, in Britain, as elsewhere, the regulatory needs of the modern welfare state have generated an increasingly wide field for enacted legislation. Consequently, the role of common law in shaping and regulating public institutions is shrinking to the vanishing point.

There has been a notable recent exception to the retreat of the common law, one that powerfully exemplifies the potential for courts making independent public policy decisions on a constitutional scale. This is the recent judgment of the English Court of Appeal in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*,¹⁷ formulating common law restrictions on the exercise of the royal prerogative. In that case, Bancoult and others challenged the legality of Orders in Council prohibiting them and other former inhabitants from returning to their home, the Chagos Islands in the Indian Ocean. They had been required to leave in 1971, in connection with the establishment of the United States military base on Diego Garcia. In 2000, the government announced plans to allow the former inhabitants and their families to return home but reversed that decision in the 2004 Orders in Council, citing both defense needs and the inability of the island to sustain the population.

The Orders in Council at issue in this case were not implementations of prior legislative acts. They were pure executive acts taken by the sovereign (represented by the government of the day) on its sole judgment. The constitutional settlement of the seventeenth century clarified the limits of unilateral action by the crown by effectively depriving the monarch of the right to 'make law' for England (and eventually the United Kingdom) without the cooperation of the houses of parliament. But there remained an area 'beyond law', a power of royal prerogative where the king or queen could act without Parliament. The prerogative, according to Dicey, was a 'residue of discretionary or arbitrary authority'.¹⁸ Its exercise was subject to control by full-blown acts of Parliament and, like the common law, its breadth has been steadily reduced by the expanding body of statute law. There is general agreement, however, that one area still subject to the prerogative is the government of overseas territories.

In *Bancoult*, the Court of Appeal emphasized that the prerogative was itself a creature of common law and thus subject to the common law decisions of the courts. It is true that the seventeenth century settlement is regarded as establishing the position that the *extent* of the monarch's discretionary authority was defined by common law. The practice of courts in reviewing its exercise on those grounds has been uncontroversial.¹⁹ This case, however, was not about the reach of the prerogative. All parties agreed that the government of the Chagos Islands fell into

'Jurisprudence' in *Selected Writings of Benjamin Cardozo* (1947) 7, 37. Cardozo's description is particularly poignant given the widely shared view that he was a master of disguising innovation as the application of existing common law principles. See William C Powers, 'Reputology' (1991) 12 *Cardozo Law Review* 1941, 1949 ('Cardozo turned the law of New York on its head, and he did so without blinking an eye.').

¹⁷ [2007] EWCA Civ 498 (23 May 2007).

¹⁸ A V Dicey, *The Law of the Constitution* (8th ed, 1915) 282.

¹⁹ Mark Elliott, *The Constitutional Foundations of Judicial Review* (2001) 175-178.

that category.²⁰ Earlier judgments, moreover, had reviewed executive actions taken *under the authority* of Orders in Council for their consistency with the authorizing Order. Those cases proceeded on a basis analogous to the well-established review of executive actions undertaken pursuant to legislation.²¹ Here, it was the Orders in Council, themselves, the direct assertion of sovereign power, that was challenged. If this exercise of authority was reviewable, it was not immediately clear what it should be reviewable against. The Court, that is, was obliged to find some law controlling the way in which this prerogative power might be exercised. Lord Justice Sedley, in the principal judgment, stated two governing criteria. First, he borrowed the well established doctrine of 'legitimate expectations' from the practice of judicial review of acts performed under the authority of statute and held that the Orders unfairly frustrated the expectations of return created by previous government promises and actions.²²

It is the other ground, however, to which Sedley LJ devoted most of his attention and is more interesting for our purposes. He concluded that the Orders were ineffective because they constituted an 'abuse of power', a term not well established in British administrative law.²³ No general criteria for identifying an abuse of power were identified. Lord Justice Sedley felt it sufficient, in this respect, to quote a judge's observation that courts should act 'in defense of the citizenry'.²⁴ The more particular inquiry into the presence or absence of an abuse of power in the *Bancoult* case itself consisted of four paragraphs rejecting the two justifications proffered for the government's action: First, the strategic needs of the United Kingdom and the United States were not relevant to the purpose of prerogative colonial government because they did not serve the interests of the Chagossians; second, the financial burden of resettlement was irrelevant because the United Kingdom was not obliged to provide any help. Sedley LJ concluded that the Orders in Council 'negate[d] one of the most fundamental liberties known to human beings ... for reasons unconnected with the well-being of the people affected' and was, therefore, an unlawful abuse of power. In coming to this conclusion, he had to have implicitly made several difficult political, social and economic determinations, including the purposes of the government of overseas territories, the extent of the moral obligation of the government to the displaced islanders and the relevance of foreign policy and defense concerns to 'the well-being of the people affected'.

While direct exercises of the prerogative are rare, and controversial ones even rarer, the idea that they are subject to review by the courts for 'abuse of power' has powerful implications for the reach of judicial policy making in the United Kingdom. The legal justification, as noted, was that the prerogative is a creature of common law and, therefore, controlled by the common law as interpreted by the courts. Since the prerogative is simply the 'residue' of state power, which the crown may exercise without the assent of the Lords and Commons, it is an 'original'

²⁰ The difference between the content of the prerogative and the limits of permissible use is, admittedly, not always obvious. The distinction is recognized in the reasons of Lord Justice Waller: *Bancoult* [2007] EWCA Civ 498 [81]. See below n 25 on judicial dicta on this distinction.

²¹ On the continuing debate as to the legitimate basis of the law of judicial review, see below n 36-37 and accompanying text.

²² [72]-[77].

²³ [60]. He also cited, at [64], Lord Mansfield that in exercising its prerogative in governing colonies the crown could not act contrary to 'fundamental principles.'

²⁴ [60], quoting Wade and Forsyth, *Administrative Law* (9th ed, 2004) 346, which itself quotes the judgment of Sir John Donaldson in *R v Datafin* [1987] 1 QB 815, 839; [1987] 1 All ER 564, 577.

constitutional power, one not created by any instance of positive law. In that respect, it is identical to the power of legislation held by Queen, Lords and Commons. (Conversely, executive actions under the authority of either acts of Parliament or exercise of the prerogative are 'subordinate', and judicial review is justifiable as implementation of the superior, authorizing norm.²⁵) Both are 'primary legislation'. To the extent the common law controls the prerogative, why should it not, to the same extent, control the legality of acts of Parliament? Of course, this is exactly what Lord Coke said 400 years ago in *Dr Bonham's Case*²⁶ and there are scholars today who make the same argument.²⁷ Most observers, however, would find a judicial decision to the effect that an act of Parliament was an 'abuse of power' and, therefore unlawful, astonishing.²⁸ Nevertheless, the logic of *Bancoult* suggests that, in the end, all serious constitutional questions are subject to the judgment of the courts.

III INTERPRETATION IN PUBLIC LAW ADJUDICATION

The review of prerogative power in the United Kingdom is not, of course, a typical instance of public law adjudication. If, as may be expected, the reach of the prerogative continues to be reduced by legislation, the resulting judicial power will become increasingly unimportant. If we put aside, as well, the spectre of common law challenges to Acts of Parliament, the common law power of the courts would appear to be a minor factor in the formation of public law. That is because, in the

²⁵ Hence the 'ultra vires' theory of judicial review of acts taken under authority of statute. See Elliot, above n 19, 182-85. Although clear instances of actual exercise of the power of judicial review over prerogative acts are hard to find, the assumption of such an authority has been slowly gaining ground. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, a case much cited in *Bancoult*, the propriety of an exercise of power undertaken pursuant to an Order in Council was at issue. Three of the Law Lords expressed dicta indicating, with varying degrees of clarity, the view that the manner of exercise of direct assertions of the prerogative (eg Orders in Council) was also subject to judicial review. See at 407 (Lord Scarman), 409-13 (Lord Diplock), and 416-19 (Lord Roskill). Some similar statements in *R v Secretary of State for the Home Dept ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) must be qualified by the fact that the prerogative acts were found in conflict with a statutory duty, albeit one that had not come into force. For an argument effectively assimilating judicial review of the manner of exercising the prerogative with the less controversial practice of reviewing its existence and extent see Elliott, above n 19.

²⁶ (1610) 8 Co Rep 107a, 114a CP.

²⁷ See Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435, surveying several commentators.

²⁸ Responding to this point in his reasons for judgment, Lord Justice Waller, at [60], declined to treat Orders in Council as 'primary legislation' in the same class with Acts of Parliament. In the case of the latter there is 'opportunity for debate and scrutiny,' while in the promulgation of Orders in Council, 'there is simply no opportunity for debate at all and no opportunity for scrutiny. It involves a minister acting without any constraint.' It is not clear what difference this makes in law. There is nothing in law to stop Parliament from acting without public debate or scrutiny and Lord Justice Waller does not suggest that its acts would be invalid if it did. See [103]. In light of the universally acknowledged fact that the government controls Parliament by strict party discipline, one may wonder how significant the differing processes would be in cases of a determined government.

ordinary case, a court adjudicating a public law claim is confronted with a text created by some authorized legislative body. That act of legislation necessarily involved a policy objective and a determination as to the proper way of achieving that objective. In these cases, therefore, the distinction between law making and law applying is especially sharp. The choices have been made. All that is left to the court, one might think, is implementation.

We take for granted, however, that even in cases governed by enacted law, courts often make decisions on the basis of fresh judgments about proper policy. Certainly, when controversial judgments are issued, criticism is generally of the court – not the legislating body. But how can a court apply its own version of policy in the teeth of a controlling enactment? This phenomenon is based on one critical word – interpretation. Even if there is agreement on identifying the controlling law, there would be no litigation if the parties agreed on what that law meant. In fact, pretty much all public law cases do is interpret texts. If more than one interpretation of a text can qualify as ‘correct’, interpretation becomes a matter of choice and that choice may be the result of some estimate as to which meaning better conforms to the interpreter’s idea of correct public policy.

There is no point here in attempting to rehearse the voluminous and inconclusive literature on the character of legal interpretation.²⁹ The ordinary approach to interpretation of any linguistic communication is an attempt to understand what the writer or speaker meant by the words chosen. That view, however, is, to say the least, a minority position with respect to legal interpretation. Even those who agree that the ascertainment of the lawmaker’s intent is the primary objective will often perceive a window of judicial discretion in cases where the nature of that intent is doubtful. And, fortunately for those who wish to include judicial choice as an element of decision, such cases turn out to be very common, indeed. In constitutional interpretation, this state of affairs is usually taken to be a consequence of the broad, even obscure, language employed by the enactors. Sometimes, the choice of such language is assumed to have been a kind of delegation to future judges of the authority to impose (within the limits of some large values indicated by the particular provision invoked) their own convictions as to the proper and improper exercise of public power.³⁰

The Eighth Amendment to the United States Constitution prohibits the imposition of ‘cruel and unusual punishments’. The Supreme Court has read the clause as requiring a consultation of ‘the evolving standards of decency that mark the progress of a maturing society’, a formula arguably expanding rather than narrowing a court’s discretion. In deciding just what those standards are, the Supreme Court has recently affirmed that, in cases assessing the constitutionality of impositions of capital punishment, ‘this Court is required to bring its independent

²⁹ For a sampling of the literature see J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (2002); L Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998). My own views are set out in R Kay, ‘Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses’ (1988) 82 *Northwestern University Law Review* 226. While my focus has been on constitutional interpretation, the same considerations largely inform interpretation of other legal texts as well.

³⁰ While, as a matter of history, this assumption has some plausibility with respect to certain, more recent constitutions, in the case of the United States Constitution the evidence for it is thin. See Kay, above n 29, 259-84.

judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders'.³¹

Even if the enactors did not affirmatively wish to create judicial discretion under these provisions, their language is sometimes seen as simply incapable of communicating a sufficiently definite meaning to decide particular cases. In such cases, it is suggested, the judges necessarily need some other basis of decision and (again within some wide limits associated with the constitution as a whole) they will have to rely on their own views of the right and wrong of government behavior.³² This kind of argument is most often employed with respect to the 'human rights' provisions of a constitution that tend to be drafted in language more inspirational than informative. Critics of constitutional judicial review of legislation under entrenched bills of rights take it as a given that no identifiable, fixed meaning of a human rights provision is possible.³³ Whatever the validity of these assumptions as a matter of theory,³⁴ they are, as further discussed below, the basis on which many courts have proceeded.

My principal focus is on judicial behavior in constitutional cases. First, however, we may digress briefly to consider the implications of open-ended interpretation for adjudication based on statutory and sub-statutory texts. To the extent such interpretation is a function of the breadth of the enacted language, statute law, simply, as a matter of experience, offers far less scope for judicial policy making. Where the contrary is true, however, courts act in much the same ways as they do in the case of broadly worded constitutional provisions. The British practice of judicial review of the actions of statutorily created agencies has already been mentioned. Until recently, these cases were understood as the application of limits inferred from a presumed parliamentary intent to require the observance of some basic standards of fairness in the execution of any statutory mandate.³⁵ The aggressive exercise of this power has, however, more and more, attenuated the link between a court's decision and the authorizing law, so that now it seems to have become a body of principles independent of any statutory construction. Perhaps as a result, the more traditional 'ultra vires' theory of judicial review has become less and less plausible and a body of literature has arisen seeking to found the practice on its own 'common law' basis.³⁶

³¹ *Roper v Simmons*, 543 US 551, 574-75 (2005). The Court held that death was an impermissible punishment for any offenses committed by persons less than 18 years of age at the time of the commission of the crime.

³² See eg, Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review*, 7-10 (1999). Michael J. Perry, *The Constitution in the Courts: Law or Politics* 55-62 (1994).

³³ See eg, Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999) 278-9. For an argument that protection of constitutional individual rights necessarily involves balancing competing principles, see Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, 2002).

³⁴ I find them invalid. See Richard Kay, 'Rights, Rules and Democracy' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 117, 130-34.

³⁵ See Elliott, above n 19, 24-36.

³⁶ See Poole, above n 27, providing a summary of several theories justifying a common law basis for judicial review, including the positions of T R S Allan, Sir John Laws, Dawn Oliver and Paul Craig. Founding judicial review on this independent authority has, of course, serious implications since it suggests that any authorization of the reviewed action by Parliament is irrelevant and, by the same token, that Parliament might not be able to validate the challenged action even by explicit language. In that

There is nothing in the law of statutory construction in the United States to equal the boldness of the British courts' experience with judicial review.³⁷ American courts, however, have not failed to seize the opportunity to expound policy when statutory language has provided an opening. The Sherman Act, passed by the United States Congress in 1894, presents a classic example. It was the first important federal antitrust law.³⁸ Section One declares '[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations ... to be illegal'. Early on, the Supreme Court rejected the contention that the statute really reached *every* restraint of trade. The 'generic' terms that Congress employed, and its failure to give them any 'precise definition', meant that the Act's coverage was left 'to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute'.³⁹ The Court thus took the Act as a mere extension of the existing common law against restraint of trade, now to be backed by federal criminal law. The Sherman Act is said to be a 'common law statute' which is, in effect, to say that the extent and character of its application are to be decided by the courts in light of the conditions that confront them at the time of adjudication.⁴⁰ The consequence is that a significant part of the antitrust policy of the United States has been left to be formulated by the courts in the course of litigation.⁴¹

When judges make policy in the course of interpreting statutes, of course, they do so at the sufferance of the legislature, which may, by apt amendments, reverse or modify the judicial result. Again, the antitrust laws illustrate the relationship. Congress has never preempted the Court's adoption of a 'rule of reason' under the Sherman Act but it has certainly changed considerably the legal regime regulating anti-competitive practices. Much of the subsequent legislation, it is true, is also non-specific, allowing even further judicial policy formation.⁴² But Congress also has enacted some quite specific rules and limitations⁴³ and has created an administrative

sense, the common law theory of judicial review is an assertion of a common law power to review acts of Parliament. See also Elliott, above n 19, defending a modified version of the *ultra vires* theory. See above n 25-27 and accompanying text on the relationship between the judicial review of exercises of the prerogative and potential judicial review of acts of Parliament.

³⁷ As discussed below, American courts have a more than compensating field for imposing policy though the exercise of constitutional judicial review.

³⁸ 26 Stat 209, 15 USC ss 1-7.

³⁹ *Standard Oil Co of New Jersey v U S*, 221 US 1, 64 (1910).

⁴⁰ *Leegin Creative Leather Products v PSKS Inc*, 127 S Ct 2705, 2720 (2007). *Leegin* itself is a good illustration. In it the Court overruled precedent holding that 'resale price maintenance' agreements were *per se* unlawful. The majority emphasized that the *per se* rule had been devised based on common law precedents as they existed in 1911 created with an eye to very different arrangements than those now governing the economy. '[T]he state of the common law 400 or even 100 years ago is irrelevant to the issue before us ...': at 2714 quoting *Continental TV Inc v GTE Sylvania*, 433 US 36 53, n21 (1997). The Court thus stressed the creative rather than the conservative aspects of common law adjudication.

⁴¹ An equally striking body of court-made law created under authority of legislation is the jurisprudence of Rule 10b-5 of the Securities and Exchange Commission, a rule created by an administrative agency prohibiting, in broad terms, any 'misleading' statement or omission in connection with the sale of any security. See Louis Loss and Joel Seligman, *Fundamentals of Securities Law* (2004) 1273-1301.

⁴² 38 Stat 730, codified at 15 USC § 12-27, 29 USC § 52-53 (Clayton Antitrust Act).

⁴³ Eg, 64 Stat 1125, 15 USC 18 (Celler-Kefauver Act (1950)).

bureaucracy to formulate more specific policies, to monitor the markets and to impose different kinds of sanctions for offending behaviour.⁴⁴

The situation is very different when the courts – and particularly the court of last resort – choose policies in the course of constitutional adjudication. Now, the court does not act under the potential supervision of the legislature. Constitutionally based judgments may, and often do, enforce a policy directly contrary to that adopted by the legislature. And, given the generous notions of interpretation, at least in many cases, while a court formally invokes the supra-legislative authority of the Constitution, it will be deciding based on its own estimate of the public welfare.

As already noted, the principal exhibit for these contentions is the adjudication of claims based on constitutionally based individual rights. Courts considering these claims generally proceed on the reasonable assumption that constitutional limits on state action are never, or almost never, intended to be unqualified. In some cases – e.g. the rights to expression, private life, religious practice— the protected activities potentially sweep in large categories of conduct the control of which is essential to any effective government. In others, certain public objectives are so important that they cannot be sacrificed even to accommodate activities at the core of the protected rights. The result is the ubiquitous process of constitutional balancing.⁴⁵

Modern constitutions commonly make these considerations explicit. The European Convention on Human Rights which is, in many ways, a constitutional instrument, qualifies many of its rights with an explicit proviso that their exercise may be limited if the limitations are ‘prescribed by law’ and are ‘necessary in a democratic society’ for the accomplishment of certain enumerated public objectives which, in fact, cover the full range of ordinary government activity.⁴⁶ While decisions sometimes turn on whether or not a particular infringement had been ‘prescribed by law’, overwhelmingly the cases are decided based on the European Court of Human Rights’ evaluation of whether or not the action was ‘necessary in a democratic society’. This judgment depends on an analysis of the harm to the individual, the value of the right relied on, the importance of the social goal being pursued, and the relative utility of the rights-infringing measure as a means towards that goal. It is hard to see how this kind of deliberation differs from that which, we can presume, preceded a legislature’s or a government’s decision to undertake the challenged action.⁴⁷

This kind of textual authorization for reconsideration of legislation has found its ultimate development in Section 36(1) of the *South African Constitution* of 1996. That provision collected most of the factors employed by constitutional courts up to the time of its enactment. When a protected constitutional right has been infringed, the Constitutional Court must decide if the limitation of the right is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

⁴⁴ Eg, 5 USC §§ 41-58, §§ 45 (FTC Act).

⁴⁵ For a comparative treatment, see Stephen Gardbaum, ‘Limiting Constitutional Rights’ (2007) 54 *UCLA Law Review* 789. On the necessity of balancing principles in the adjudication of constitutional rights, see Alexy, above n 33, 44-110, 178-222.

⁴⁶ The limiting provisions are set out in the second paragraphs of Articles 8-11 (privacy, religion, expression, association). The exact formulations are slightly different in each Article but, as noted in text, they end up covering the full extent of the police power.

⁴⁷ For an argument that balancing in human rights adjudication involves the comparison of incommensurables and that it is, for that reason, usually more properly consigned to explicit political decisions, see John Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’ [2006] *Public Law* 697.

- (a) the nature of the right
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve its purpose.⁴⁸

This provision may produce a certain form and structure for exercises of judicial review, but the variety of its substantive content, the imprecision of its standards and the absence of a prescribed method of weighting the interests mentioned necessarily result in a charge to decide whether, all in all, it was or was not a good idea to violate the right in the particular case. As one commentator, sympathetic to the practice, has recently concluded, 'this part of the judicial function is inherently non-interpretive'. It consists rather of 'assessing the importance and fit of ... state objectives and policies'.⁴⁹

These two examples of express textual authorizations for wide-ranging judicial review of the correctness of government action are typical of modern constitutions. But it is hardly essential that such an express constitutional license be available before courts engage in this practice. In fact, unlike some articles of the European Convention mentioned, Article 3, prohibiting torture and inhuman or degrading treatment and punishment, lacks a limiting proviso. Unlike most of the Convention, moreover, this right may not even be the subject of derogation in a time of emergency. The Court in Strasbourg has made much of its absolute character.⁵⁰ Still, when push comes to shove, that Court has been unwilling to find a violation of that article when otherwise unacceptable treatment is used for what the Court judges to be sufficient reason.⁵¹

The United States Constitution lacks explicit limits on the rights it declares, but the Supreme Court has had little difficulty redefining those rights so as to find them inapplicable where the state has acted in pursuit of a sufficiently important public objective. The resulting limits vary depending on the circumstances. The Justices of the Supreme Court are practiced masters in melding the rhetoric of rights with hard-nosed cost-benefit analysis. There are many possible examples, but it suffices to consider recent controversial adjudication concerning the extent of a constitutional right to abortion. Of course, there is nothing in the text of the Constitution about abortion or even about a constitutional right to 'privacy', which is supposed to underpin the abortion rights. Rather, the Court has relied on the Fifth and Fourteenth Amendments as the ultimate legitimizing source of its decisions. Those constitutional provisions prohibit the deprivation of liberty 'without due process of law'. With an impressive indifference to language and history, the Supreme Court has interpreted 'without due process of law' to mean 'without a good enough reason'. (The first invocation of this meaning was in the infamous 'Dred Scott' case of 1856, holding unconstitutional legislative limitations of property in slaves.⁵²) It

⁴⁸ Quoted in Gardbaum, above n 45, 799. The South African formula adopts many of the factors approved by the Supreme Court of Canada for judging the propriety of limitations of rights under Section 1 of the Canadian *Charter of Rights and Freedoms*. *R v Oakes* [1986] 1 SCR 103.

⁴⁹ Gardbaum, above n 45, 829

⁵⁰ Eg, *Pretty v United Kingdom* (2002) III Eur Court HR 155, [49].

⁵¹ See, eg, *Caloc v France* (2000) IX Eur Court HR 45, [93]-[101].

⁵² 60 US (19 How) 393 (1856). At 450: 'An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no

has, moreover, picked out interferences with certain kinds of liberty as demanding an especially convincing justification. At the end, we have a more or less undisguised examination of the best ways to accommodate individual and collective interests in differing circumstances, a state of affairs more or less identical to that in jurisdictions with more obvious textual authorizations.

It is not entirely surprising, therefore, that the first abortion case, *Roe v Wade*,⁵³ set up a scheme so detailed, that the decision was reasonably compared to a regulatory statute.⁵⁴ And like legislative regulation, the doctrine has been modified, adjusted and refined over time. The Court's most recent pronouncement on abortion makes evident the similarity between the ordinary process of legislation and the constitutional decisions of the Court. At issue was a congressional enactment prohibiting 'partial-birth' abortions, in which the intact fetus is destroyed after a significant part of the body has been emerged from the mother.⁵⁵ Last year, the Supreme Court held, 5-4, that the law was constitutional. The standards invoked were taken from the Court's earlier decisions. Remarkably, neither the Fifth nor the Fourteenth Amendment, the sole constitutional bases for this line of cases, *is even mentioned in either majority or dissenting opinion*. The starting point was a dictum of the Court in a prior case, declaring that the government could not limit particular abortion procedures if they were 'necessary in appropriate medical judgment for the preservation of the life or health of the mother'.⁵⁶ Much of the disagreement between majority and dissent was based on differing evaluations of the medical evidence bearing on the clinical need for the procedure. The data for these assessments consisted of transcripts of expert testimony in lower courts, Congressional findings recited in the statute, hearings, articles in medical journals and statements of professional organizations. The majority concluded that the fact that there was substantial medical disagreement meant no health exception was necessary.⁵⁷ The dissent, in contrast, found the same disagreement proved the existence of a risk requiring a health exception.⁵⁸ The decision thus turned on the appropriate level of risk in a situation of admitted uncertainty: How safe is safe enough? How long is a string?

As this example, and the other cases considered show, the courts frequently set for themselves a question very different from the conventional legal question: Is this practice consistent with this rule? The abortion jurisprudence turns out to be an attempt to accommodate at least three concerns, the liberty of the woman to choose whether or not to give birth, the protection of the health of the pregnant woman, and the life or wellbeing of the fetus. As the majority opinion notes, 'balance [is]

offence against the laws, could hardly be dignified with the name of due process of law.'

⁵³ 410 US 113 (1973).

⁵⁴ John Hart Ely, 'The Wages of Crying Wolf: A Comment on *Roe v Wade*' (1973) 82 *Yale Law Journal* 920, 926.

⁵⁵ *Gonzales v Carhart*, 127 S Ct 1610 (2007). The prohibition did not apply when the procedure was 'necessary to save the life of the mother': at 1614.

⁵⁶ *Planned Parenthood of Southeastern Pennsylvania v Casey*, 410 US 113 (1992). The majority in *Gonzales* also reviewed whether the law placed an 'undue burden' on the woman's decision to procure an abortion. In so doing, it considered the proper trade off between the right of the woman and the desire of the state to preserve fetal life: 127 S Ct 1610, 1632-5 (2007).

⁵⁷ 127 S Ct 1610 1635-9 (2007).

⁵⁸ *Ibid* 1645-6.

central'.⁵⁹ But there is no metric against which it is possible to measure the extent to which any of these concerns is served, much less one that allows them to be compared to each other. How these competing values strike you depends necessarily on 'where you're coming from'. Not surprisingly, the majority opinion expounded, at some length, the propriety of the state's interest in fetal life while the predicate for the dissent's argument was an extended rehearsal of the value of independence and autonomy in women's lives.⁶⁰ It is no wonder that a prominent American appellate judge has complacently referred to the Supreme Court as 'inherently and not merely accidentally a lawless judicial institution'.⁶¹

IV THE RULE OF LAW AS A PUBLIC POLICY

I want to stress one significant, but sometimes under-appreciated, consequence of a policy-making role for judges, exercised in the course of deciding cases: It is subversive of the basic values associated with the rule of law. Indeed, it carelessly abandons the single unique contribution that law and legal institutions make to social well being.

First, however, I should mention two other common objections to policy making in the courts – first, that it makes for inferior results in terms of social welfare and, second, that it is inconsistent with the democratic values underlying modern governments. As to the first – the quality of decision-making – there may be institutional advantages in maintaining separate agencies for legislating and adjudicating. Legislation involves a single decision to be applied to numerous instances. It is feasible, therefore, to establish the legislative decision-making machinery on a human and material scale that would be impossible to provide for each and every individual case. Thus, modern legislatures may have resources for investigation and invention that can never be marshaled in aid of individual decisions.⁶² There is another reason to worry about a process that makes general decisions in the context of specific cases. The presence of the particular litigants and their particular circumstances may distort the policy maker's perception of the relevant costs and benefits over the whole universe of affected cases. It is enough, in this respect, to remember the old saw that 'hard cases make bad law'. Both of these aspects of judicial policy making raise entirely plausible concerns, but the 'quality' of legislation is the kind of thing that can hardly be defined, let alone tested in some verifiable way. Whatever our doubts in this regard, any heuristic evaluation ought to take account of the fact that, in many modern democracies, public opinion polls, at least, show a significantly higher regard for the integrity and capacity of judges than for those of legislators.⁶³

⁵⁹ Ibid 1627. The quotation is a reference to the holding in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 410 US 113 (1992).

⁶⁰ 127 S Ct 1610 1626-27, 1641-42 (2007).

⁶¹ Richard A Posner, 'Foreword: A Political Court' (2005) 119 *Harvard Law Review* 32, 41. The author hastens to add that he uses the word 'lawless' in a 'nonjudgmental' sense.

⁶² See, eg, Adrien Vermeule, 'Common Law Constitutionalism and the Limits of Reason' (2007) 107 *Columbia Law Review* 1482, 1506-18.

⁶³ In a September, 2007 poll, 69% of Americans said they had a 'great deal' or 'a fair amount' of confidence in the Supreme Court. The numbers for 'the presidency' and Congress were 43% and 50% respectively. Survey by Gallup Organization, September 14-September 16, 2007. Retrieved from the *iPOLL Databank*, The Roper Center for

The second, and probably the most frequently expressed, concern about courts' intervention in public policy choices is the extent to which it subverts the democratic legitimacy of governing law. This worry is, in some ways, also a substantive, practical consideration. We might reasonably expect that successful law can only be created in a process that takes into account the sensibilities of the population it is to govern. More commonly, however, this objection is premised on basic principle, the conviction that only popular consent can legitimize the employment of the coercive power of the state. In either case, judges, typically, are perceived as incompetent or, at least, less competent, at vindicating the preferences of the population. In most jurisdictions, they are not elected and, where they are (as in many state judiciaries in the United States), they rarely justify their actions by pointing to any representative status, (although, not infrequently, they invoke the requirements of 'democracy'.⁶⁴) The sole expressed responsibility of the judge is to 'the law' and we have already explored what that is likely to mean in many cases. The issue, in any event, is relative. Judges are, at least, further removed from democratic authority than elected legislators and other politically chosen officials. This is an old objection and it has recently been renewed with particular vigor.⁶⁵ The obvious response to these criticisms (at least in states with enforceable written constitutions) is that the institution of constitutional judicial review is nothing but a deliberate decision to thwart the choices of ordinary political actors.⁶⁶

My principal concern with policy-making by judges, however, goes to neither utility nor to authority. The idea that we ought to make our collective decisions, at least in part, by committing them to judges who are to formulate them as they decide particular disputes, is inconsistent with the peculiar qualities that law brings to social organization, with what medieval philosophers would have called its *haecceity*. Put another way, the problem is not that it makes judges legislators, but that, in so doing, it deprives us of their services as judges.⁶⁷

Public Opinion Research, University of Connecticut
<http://www.ropercenter.uconn.edu/ipoll.html> at 6 December 2007.

⁶⁴ These declarations often appear in extra-judicial defenses of constitutional judicial review. See Kay, above n 34, 119-120.

⁶⁵ There are innumerable discussions on this point. A standard citation is Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 16-23. This objection should be distinguished from the recent flurry of writing on behalf of 'popular constitutionalism'. There are several varieties of the latter but they all emphasize some role of 'the people' not exercising a sovereign will, but participating in the determination of the correct *interpretation* of binding constitutional rules. Eg, Christopher L Eisgruber, *Constitutional Self-Government* (2001); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away From the Courts* (1999). Of course, to the extent we are skeptical of the capacity of judges to interpret legal rules independent of personal policy preferences, we are unlikely to be convinced that the product of such popular deliberation will be more faithful to the pre-existing content of the rules in question. The democratic commitment mentioned in text, in contrast, is to the presumptive right of the people to make their own decisions apart from any constraining text. There is also a tradition of attempting to reconcile constitutional judicial review with democratic government. I have found these efforts mainly unsuccessful. See Kay, above n 34, 119-23.

⁶⁶ Kay, above n 34, 122-3.

⁶⁷ For an argument that judicial policymaking is illegitimate to the extent it extends the judicial role beyond the rights of litigants see Stephen Guest, 'The Role of Courts in the Making of Policy' (2006) 25 *University of Queensland Law Journal* 307.

I began with the observation that all law is policy but it is not true that all policy is expressed in law. We are content, that is, to decide many, probably most matters, of public concern, one by one, as they arise, without the constraint of any a priori rule. As noted, the apocryphal kadi will probably decide with reference to some set of values, but the distinctive feature of his jurisprudence is that he acts ad hoc, in light of every consideration relevant to the particular case. To have a real system of law, on the other hand, entails a different kind of policy-making and application, one that embodies the policy in an abstract binding rule and then implements it by setting up agencies charged with executing it in particular cases. Acting through rules has been associated with a number of different values. At the centre, however, are the features of predictability and stability. Government by rule necessarily has a temporal aspect. The rule specifies, in advance, how the state will respond to defined behavior and the absence of a rule signals, in advance, the absence of a response.

The lives of human beings in organized social communities are critically affected by the number and quality of the occasions on which the collectivity intrudes. To the extent these intrusions are in execution of pre-existing rules, individuals are provided with a kind of chart to guide personal decisions. So Coke assigned to the law the 'office of guiding travelers through dangerous and unknown ways'.⁶⁸ The consequent reduction of a significant category of surprises imparts a sense of security that many people value for its own sake. More practically, it makes more attractive the undertaking of long-term projects and allows individuals to define and shape their own lives and, concomitantly, it energizes productive activity with other possible beneficial effects on society.⁶⁹

The promotion of this regime of certainty and predictability is the single peculiar value of the institution of law. There is no other social or political good that emanates from courts that might not be educed from some other kind of political institution. And, conversely, there is no other social institution capable of reproducing those special benefits. The indispensable machinery for realizing this kind of government is the discrete sequencing of rule creation and rule application. When the agencies created for rule application act as rule makers, they subvert the constitutional design in two ways. First they change the mix of policies that might have been expected had the explicitly designated lawmaking institutions acted alone. But, at least as important, people may no longer act with the same assurance as to what they may do and what others, including the state, may do to them. Without some basic level of confidence in rules, there is no point in law or in courts.⁷⁰

It may reasonably be questioned, of course, whether a constitutional system in which courts are confined to rule application is really superior, in any substantial measure, in realizing the benefits of the rule of law. After all, there is a picture of common law judicial lawmaking in which courts gradually refine and perfect the

⁶⁸ Edward Coke, *The Second Part of the Institutes of the Laws of England* (1644) 526.

⁶⁹ For a rigorous examination of the benefit of rule-constrained decision-making see F Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 137-49. The classic American exposition of the relationship between law and the release of economic energy is J Willard Hurst, *Law and the Conditions of Freedom in Nineteenth Century United States* (1956).

⁷⁰ 'The law's determinacy is right at the core of its moral function, and law serves its moral function of reducing the moral costs of moral error, of conflict, of lack of coordination, and of practical time and resource-consuming decision making by claiming practical authority for its more determinate commands.' Alexander and Schauer, 'Law's Limited Domain Confronts Morality's Universal Empire' (2007) 48 *William and Mary Law Review* 1579, 1586.

marginal aspects of a core of settled principle. Stability and predictability are realized in this model, not by the creation and maintenance of fixed rules, but by the expectation that change will be modest and confined by the discipline of stare decisis. Some commentators have urged the application of this model to public law, and especially constitutional law, adjudication, finding in it an attractive compromise of steadiness and adaptability.⁷¹ In this respect, however, the experience in American courts is far from re-assuring. There have, admittedly, been occasions where justices of the Supreme Court have explicitly reaffirmed a holding they thought erroneous on the basis of a binding precedent.⁷² But those instances are rare and seem to be becoming rarer.⁷³ The same kinds of factors that have discouraged judges from submitting to fixed meanings in a controlling text seem at work with respect to the even less precise constraint of stare decisis.⁷⁴ The 'partial birth abortion' case, discussed above, for example, was a distinct departure from the Court's holding seven years earlier with respect to a very similar state statute.⁷⁵

It might be objected, moreover, that the pre-existing rules that courts are supposed to be applying are themselves far from secure. It is true, of course, that legislative rules are also inherently provisional. But there is reason to think that legislation, faithfully applied, can still provide more assurance than policies arising out of judicial decisions. Significant legislative policies are usually the product of a fairly intense and costly process of investigation, deliberation, political consultation and compromise. In light of the investment of human energy and political capital, this is an enterprise not likely to be often repeated. As a result, it is not unreasonable to assume that a policy implemented by legislation will hold for a reasonably long period. And the same process means that changes are likely to be signaled well in advance of their promulgation. The definitional responsiveness of representatives to

⁷¹ Eg, David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877.

⁷² See eg, *Seminole Tribe v Florida*, 517 US 44, 130 (1996) (Souter J dissenting).

⁷³ The Court has been overruling its own precedents at a rate of about one a year. Over the last ten years see *Bowles v Russell*, 127 S Ct 2360 (2007); *Leegin Creative Leather Products v PSKS Inc*, 127 S Ct 2705 (2007); *Crawford v Washington*, 541 US 36 (2004); *Lawrence v Texas*, 539 US 558 (2003); *US v Hatter*, 532 US 557 (2001); *Mitchell v Helms*, 530 US 793 (2000); *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*, 527 US 666 (1999); *Minnesota v Mille Lacs Band of Chippewa Indians*, 526 US 172 (1999); *Hohn v US*, 524 US 236 (1998); *Hudson v US*, 522 US 93 (1997); *State Oil Company v Khan*, 522 US 3 (1997); *Agostini v Felton*, 521 US 203 (1997). In many more cases, of course, it has narrowed or reformulated prior holdings.

⁷⁴ 'It has proven fiendishly difficult to articulate any formula for determining when a past decision is sufficiently defective or outdated so as to warrant overruling, or indeed even to be specific about the criteria that should govern this subject.' Steven D Smith, 'Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium' (2007) 5 *Ave Maria Law Review* 153, 156. For an example of the 'weighing' of factors relevant to the decision to adhere or depart from precedent see *Moragne v State Marine Lines Inc*, 398 US 375 (1970). One commentator has proposed that the decision as to whether or not to accord precedential effect to a judgment depends on whether or not the earlier holding meets one of thirteen criteria. Thomas Healy, 'Stare Decisis as a Constitutional Requirement' (2001) 104 *West Virginia Law Review* 43, 115. On the inherent difficulties of attempting to follow precedents see Frederick Schauer, 'Precedent' (1987) 39 *Stanford Law Review* 571, 591-5.

⁷⁵ The majority did not overrule the earlier case but distinguished the two statutes. The dissent reasonably complained that the Court had 'refuse[d] to take [the earlier holding] seriously'. The three dissenting justices from the first judgment were now in the majority. The four remaining justices from the earlier majority were in dissent.

popular sentiment means that, typically, a change is in the wind for some time before legislative action is accomplished.

Changes in policy stemming from judicial action, on the other hand, arrive on no predictable schedule depending, as they do, on the happenstance of litigation. While 'great cases' may require a somewhat more difficult process of consultation and drafting, all in all, they are decided much like any other case. It takes little more than a change of mind by one or two judges or – more commonly – change of personnel, to set the stage for important changes in policy. By design, judges do not need to take account of the usually lumbering shifts in public opinion before changing the rules in important ways. Given the pretence that the new policy is merely an enunciation of existing law, such holdings are presumptively retroactive, having the potential to unsettle past private actions. The United States Supreme Court's practice of 'prospective overruling', in cases where it regards the practical cost of retroactivity as unacceptable, is an implicit acknowledgment of its role as a fresh policy-maker. But the open-ended character of that doctrine actually makes any estimates of the impact of judicial intervention even more difficult.⁷⁶

The instability of legislative policy, moreover, is actually exacerbated by the unpredictable behavior of judges in public law cases. I have already noted some of the institutional constraints on legislative caprice. But the central device in constitutional democracies for reconciling legislative flexibility and the rule of law is the enforceability of constitutional restrictions. The conventional understanding of constitutionalism presupposes a set of stable rules, dealing with the most essential values of a society and enacted by an extraordinary convocation of representatives of the society – the 'people' in their most radical manifestation. Those rules constitute the organs of the state and set the limits to their authority. The virtue of government by rule is thus imposed on the rule makers, putting limits on the reach of the state where a need for order is most acute. We presume that these hyper-rules, while they are effective, draw their effectiveness, in part, from their consonance with widely held convictions about the proper role of government. But, if that were all that were at stake, decisions would best be left to the even more responsive elected officials. At least in the short and medium terms, constitutions do their work by frustrating the more immediate preferences of the majority. The central premise of the enterprise is that this is a price worth paying to enhance the ability of individuals to be able to plan their lives, in certain respects, with reasonable confidence that the state will not interfere in unpredictable ways. With that picture in mind, we see the perverse irony of a judicial substitution of active policy creation for genuine review of state acts against pre-existing controlling rules.

The disturbing effect of judicial intervention in the formulation of rules is, moreover, more than the simple addition of a new deliberative institution to the process of lawmaking. It results in a messy process in which legislatures and other acknowledged policy makers provide the first step. Review and possible revision by

⁷⁶ As to the reasoning behind the presumptive retroactivity of constitutional judgments and its qualifications, see Lawrence Tribe, *American Constitutional Law* (3rd ed, 2000) 213-32. On 'prospective overruling', see *James B Beam Distilling Co v Georgia*, 501 US 529 (1991). Legal systems adopting the centralized version of constitutional review, such as those prevalent in Europe, tend to treat decisions by constitutional courts invalidating legislation as prospective only. Such courts will, as well, sometimes issue judgments announcing the need for changing the law in some stated period. See Wiltraut Rupp-v.Brünneck, 'Admonitory Functions of Constitutional Courts' (1972) 20 *American Journal of Comparative Law* 387. This practice is interesting insofar as it emphasizes the mixed political-judicial character of these courts. See generally, Alec Stone Sweet, *Governing With Judges* (2000).

the courts sometimes follow and sometimes do not, depending on the opportunities built into the particular legal system and the willingness of authorized individuals to exploit those opportunities.⁷⁷ The adjustments made by a court, furthermore, need not be the end of the matter. Even in constitutional cases, political policy-makers may respond with evasions or resistance. (It was in fashion, not long ago, to talk about constitutional adjudication as initiating a 'dialogue' between courts and legislatures.⁷⁸) All of this takes place, moreover, with only the mildest influence from any felt obligation to conform to pre-existing, constraining rules. The process, in short, is less predictable than might be expected from the operation of a single periodically elected legislature, one uncontrolled by a constitution.⁷⁹

We need to put this issue in perspective. For all its problems, the successful assertion of judicial will is not the worst thing that can happen to a community. We do not, in fact, live in a world of unbearable risk – although an encounter with the legal system is still a bewildering and frustrating experience for most people.⁸⁰ There might, indeed, be some wisdom in maintaining a role for policy-makers who, like judges, are not immediately accountable to public opinion. (Were we to design such a system from scratch, however, we would be very unlikely to end up with one much like the one we have.⁸¹) Perhaps, in the end, we have achieved a superior mix of substantive social and political policies by bringing judges into the process. Nevertheless, in doing so, we have given up, in an important way, the peculiar contribution that law can make to our collective well being.

⁷⁷ See generally, R Kay (ed), *Standing to Raise Constitutional Issues: Comparative Perspectives* (2006).

⁷⁸ An influential early article was Peter W Hogg and Allison Bushell, 'The Charter Dialogue Between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 79. A recent recapitulation is Christine Bateup, 'Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective' (2007) 21 *Temple International and Comparative Law Journal* 1.

What Stephen Gardbaum says of systems explicitly authorizing certain legislative 'overrides' of judicial constitutional decisions is true, in fact, of most systems of constitutional judicial review:

[A limited override power] transcends the traditional either/or nature of judicial review and the binary choice of judicial versus legislative supremacy by focusing instead on alternative and intermediate allocations of power between the courts and political institutions.

Gardbaum, above n 45, 817.

⁷⁹ While my description of judicial policy-making is faithful to much public law adjudication in many jurisdictions, it does not describe all public law adjudication nor am I convinced that its appearance is inherent in the very existence of a judicially enforceable constitution. See Richard S Kay, 'American Constitutionalism' in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998) 16, 39-50.

⁸⁰ 'I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death.' Fred R Shapiro, *The Oxford Dictionary Of American Legal Quotations* (1993) 304, quoting Learned Hand.

⁸¹ On the argument for institutionalizing a non-democratic element into public decision-making, see Kay, above n 34, 129-30.